APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-1495

JAMES O. GORMAN, PLAINTIFF-APPELLANT

v.

ARMY AND AIR FORCE EXCHANGE SERVICE,
DEFENDANT-APPELLEE

June 27, 1980

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

As in *Sheehan* v. *Army & Air Force Exchange Service*, 619 F.2d 1132 (5th Cir. 1980), the sole issue on this appeal is whether the district court possessed subject matter jurisdiction to consider an action alleging wrongful discharge. This suit was initiated by James Gorman against the Army & Air Force Exchange Service ("AAFES") after administrative remedies proved futile.

Gorman was employed as a merchandising specialist with the AAFES in its Executive Management Program. He received final notice of separation and thereafter exhausted administrative appeal. Suit was filed in the district court against the AAFES alleging that the discharge was (1) arbitrary and capricious

and an abuse of discretion, (2) not in accordance with the AAFES personnel rules and regulations, (3) a deprivation of due process, and (4) not supported by substantial evidence. Gorman sought reinstatement; back pay, along with restoration of all other employment benefits; an attorney's fee; and costs. The district court dismissed the suit for want of subject matter jurisdiction.

Today in *Sheehan* we hold that the district court had subject matter jurisdiction for a virtually identical suit under a confluence of 28 U.S.C. §§ 1331(a), 1346(a)(2) (1976) and 5 U.S.C. § 702 (1976). Although sections 1331(a) and 1346(a)(2) were not specified as bases for jurisdiction in Gorman's complaint, since the allegations meet the statutory requirements, the lower court had jurisdiction despite the omission. *See Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.6, 98 S.Ct. 2002, 2005 n.6, 56 L.Ed.2d 570 (1978); *Schlesinger* v. *Councilman*, 420 U.S. 738, 744 n.9, 95 S.Ct. 1300, 1306, 43 L.Ed.2d 591 (1975). For the reasons stated in *Sheehan*, we hold that the lower court had subject matter jurisdiction.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-78-0304-F

JAMES O. GORMAN, PLAINTIFF

v.

ARMY AND AIR FORCE EXCHANGE SERVICE,
DEFENDANT

[Filed Jan. 15, 1979]

ORDER

THIS DAY came before the Court for hearing Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, and it appearing to the Court that the Court is without jurisdiction to entertain this suit for the reasons stated in defendant's motion, it is hereby

ORDERED, ADJUDGED and DECREED that the complaint be and hereby is dismissed with prejudice; costs to be awarded to defendant.

/s/ Robert W. Porter
United States District Judge

Dated: January 15, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-1495

D. C. Docket No. 3-78-0304-F

JAMES O. GORMAN, PLAINTIFF-APPELLANT

versus

ARMY AND AIR FORCE EXCHANGE SERVICE,
DEFENDANT-APPELLANT

Appeal from the United District Court
for the Northern District of Texas

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the defendant-appellee pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

June 27, 1980

Issued as Mandate: Jul. 23, 1980.

Reissued as Mandate: October 8, 1980.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1495

JAMES O. GORMAN, PLAINTIFF-APPELLANT

versus

ARMY AND AIR FORCE EXCHANGE SERVICE,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Texas

[Filed Sep. 26, 1980]

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 6-27-80, 5 Cir., 198—, —— F.2d——).

(September 26, 1980)

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active

service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

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